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SUPREME COURT, U.S.

No. 05-806

IN THE

Supreme Court of the United States

GARY S. WEBBER,

Petitioner,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the First Circuit correctly affirm the district court's decision granting International Paper's Renewed Motion For Judgment as a Matter of Law because Petitioner Gary Webber ("Webber")—the only engineer in his engineering department without an engineering degree—failed to present legally sufficient evidence that his position was eliminated because of his disability, rather than his lack of engineering degree?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, International Paper Company makes the following disclosure:

International Paper Company has no parent company and no publicly held company owns 10% or more of International Paper Company's stock.

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INTRODUCTION

Both the Questions Presented and the Reasons for Granting the Petition, as presented by Webber, inaccurately set forth the First Circuit's holding and analysis. It is regrettable that Webber has crafted the Questions Presented and Reasons for Granting the Petition in such a way as to create the illusion of a conflict with Supreme Court precedent where, in reality, none exists.

The First Circuit's opinion is wholly consistent with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and does not implicate *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In reliance on well-settled First Circuit precedent that is consistent with *Reeves*, the First Circuit reviewed "all the evidence, reasonable inferences, and credibility determinations in the light most favorable to" Webber. *Webber v. International Paper Co.*, 417 F.3d 229, 233 (1st Cir. 2005). Webber's arguments that the First Circuit (1) improperly credited disputed testimony; (2) resolved conflicting testimony; and (3) ignored evidence that pointed towards disability discrimination are without merit.

Contrary to Webber's contention, the First Circuit's holding does not implicate this Court's decision in *O'Connor* because the First Circuit did not affirm the district court's decision based on Webber's failure to establish a *prima facie* case. Instead, the Court looked at the strength of Webber's *prima facie* case as a factor in determining that Webber failed to meet his burden of proof.

STATEMENT OF THE CASE

Fred Oettinger ("Oettinger"), the Mill Manager, was responsible for twelve different departments at the Mill, including the maintenance and engineering department. A-255-257. Project engineers were a part of the engineering department. *Id.* A "BS degree in Mechanical or Civil Engineering" was a "[r]equired criteria" for the project engineer position. A-21.

The Mill Accommodates Webber's Knee Injury

Webber injured his knee in 1997. A-161. From 1997 through his downsizing in the summer of 2001, Webber requested numerous accommodations. Webber received every accommodation he requested.[1] A-171-72. These accommodations included:

- working from home for a total of 7 ½ months in 1999 and 2000;
- providing Webber with a laptop computer;
- providing Webber with a light duty job;
- reassigning Webber from a 3rd floor office to a 1st floor office;

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1. Webber's Petition contends that the First Circuit "stressed accommodation [sic] IP gave to Mr. Webber, A-3a, but ignored the long delay in implementing them. A-96-100, A-198-199." The record does not support Webber's claim that there was a long delay in implementing any of the accommodations International Paper afforded Webber.

- installing "glide chairs" in two different buildings;
- providing Webber with a reduced hour or part-time schedule;
- reassigning some of the physical aspects of Webber's job;
- permitting Webber to park inside the Mill, even though there were four handicap parking spaces in the employee lot and the Mill Manager did not park inside the Mill.

A-162-72.

The Corporate Reduction in Force: "Functional Fast"

In 2001, International Paper underwent a nationwide reduction in force called "Functional Fast." A-260. As part of Functional Fast, International Paper determined that it needed to reduce staff levels by 3000 employees in certain areas of the business to reduce costs. *Id.*

In June 2001, Oettinger learned that he had to reduce the Mill's technical staff positions from 47 to 39 positions as part of Functional Fast. A-262. In a meeting with his Human Resources Manager, David Libby, his Operations Manger, Jeff Hamilton, and three corporate managers from Memphis, Oettinger determined that he would need to eliminate two project engineer positions. *Id.* At that time, the Mill had ten project engineers while other comparable International Paper mills had only six project engineers. *Id.*

Oettinger Selects Webber As Part Of The Downsizing

Of the ten project engineers in Bucksport, Oettinger had to decide which two engineers were the least valuable to the business. A-263. Webber was one of two project engineers selected. A-263. Oettinger selected Webber because he was the only project engineer who did not possess an engineering degree. A-264. Oettinger believed that without an engineering degree Webber was unable to do some of the projects that degreed engineers were qualified to perform, so he was relegated to performing lower level types of projects such as office renovations. A-265. While Oettinger discussed these selections with Libby and Hamilton, Oettinger made the final decision. A-237, A-263, A-440.

After he made his decision, Oettinger met with Webber's first- and second-line supervisors Larry Schaub and Steve Moser, on Friday, June 22, 2001. *Id.* Both Schaub and Moser agreed with Oettinger's decision to eliminate Webber's position. A-311, A-355.

The next business day, Monday, June 25, 2001, Oettinger and Libby met with Webber and advised him that his position would be eliminated effective July 15, 2001 due to Functional Fast. A-125, A-268-69. According to Webber, in response to Webber's question about why he was selected, Oettinger told him that it was because of the quantity and quality of his work. A-125-26. According to Webber, during the same brief conversation, Oettinger explained that because Webber did not have an engineering degree he "could not do the functions of an engineering position." A-127.

Notably Webber:

- failed to present any evidence that Oettinger harbored any animus or stereotypes towards people with disabilities; A-61;

- admitted that he was not more qualified than Nick Blanchard, Mr. Bennett, Mr. Cyr, and Mr. Thompson—engineers that were retained; A-174-75; and

- admitted that he—unlike all of the other engineers—did not have an engineering degree. A-173-174.

The First Circuit Affirms the Entry of Judgment as a Matter of Law

Relying in part on *Reeves*, the district court granted International Paper's Renewed Motion For Judgment As A Matter of Law after the jury returned a verdict in Webber's favor. The district court assumed Webber established a *prima facie* case. The district court then held that "no reasonable fact-finder could find that IP's proffered reason for Mr. Webber's termination was pretextual, and that even assuming the proffered reason was pretext, no reasonable fact-finder could find that Mr. Webber's termination was the product of disability discrimination." *Webber v. International Paper Co.*, 326 F. Supp. 2d 160, 166 (D. Me. 2004).

The First Circuit affirmed the district court's decision holding that "Webber failed to meet his burden of proof to show that the proximate cause of his termination was IP's discriminatory animus." *Webber*, 417 F.3d at 240 (1st Cir. 2005).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with *Reeves*, *O'Connor*, any decision of this Court, or any Court of Appeals for that matter. The First Circuit correctly affirmed the district court's decision granting International Paper's Renewed Motion For Judgment as a Matter of Law because Webber—the only engineer in his engineering department without an engineering degree—failed to present legally sufficient evidence that his position was eliminated because of his disability. The First Circuit properly viewed all of the evidence, reasonable inferences, and credibility determinations in the light most favorable to Webber.

Webber's attempt to demonstrate a conflict with *O'Connor* is unavailing. The First Circuit did not affirm the district court's decision because Webber failed to establish a *prima facie* case. Rather, in determining whether Webber had advanced sufficient evidence from which a reasonable jury could conclude that his job was eliminated because of his disability, the Court looked at many factors, including the strength of Webber's *prima facie* case.

> While the failure or weakness of a *prima facie* showing will not alone constitute grounds for judgment for the employer, it significantly weighs in the balance when we assess whether the plaintiff adduced sufficient evidence overall from which a jury rationally might infer that the employer's articulated reason constitutes a pretext for discrimination, and that the real reason for the termination was discriminatory animus.

Webber, 417 F.3d at 235.

I. THE FIRST CIRCUIT CORRECTLY APPLIED *REEVES*.

An appellate court reviews the district court's judgment entered as a matter of law *de novo*, weighing "all the evidence, reasonable inferences, and credibility determinations in the light most favorable to the nonmoving party (*viz* Webber.)" *Webber*, 417 F.3d at 234. While the appellate court is required to "draw all reasonable inferences in favor of the nonmoving party" it "must review the record 'taken as a whole.'" *Reeves*, 530 U.S. at 150 (2000) (internal citations omitted). The First Circuit correctly applied this standard.

In a desperate attempt to show that the First Circuit's holding contravenes *Reeves*, Webber argues that the First Circuit (1) improperly credited Oettinger's testimony; (2) resolved conflicting testimony between Oettinger and other witnesses; and (3) ignored evidence that pointed towards disability discrimination. Webber's arguments fail.

A. The First Circuit Did Not Rely Upon Oettinger's Disputed Testimony.

Instead of showing that the First Circuit relied upon Oettinger's disputed testimony, Webber points to testimony that the First Circuit did not mention—much less rely upon—in its opinion. For instance, Webber argues that the First Circuit relied upon "Oettinger's claim that he had to make a hurried decision." Webber Petition at 13. In reality, the First Circuit's opinion does not mention that Oettinger's decision was hurried. Likewise, Webber argues that the First Circuit relied upon Oettinger's testimony that he eliminated eleven employees. *Id.* Again, the First Circuit's opinion does not

mention this testimony. Rather, the First Circuit's opinion mentions Oettinger's uncontradicted testimony that he had to reduce the "technical" staff (including engineers) by eight and that after learning that comparable sized mills had only six project engineers (he had ten) he decided to cut two project engineer positions. *Webber*, 417 F.3d at 233.

Last, Webber argues that the First Circuit improperly relied upon the number of people involved in the decision to eliminate his position. Webber argued that Oettinger testified "that he made the decision and only then consulted with 'the national office.'" Webber Petition at 13. This was not Oettinger's testimony. In fact, the First Circuit's opinion correctly states *the exact opposite*. "Following consultations with the national office, Oettinger eventually selected Webber and Wayne Jacobs for termination." *Webber*, 417 F.3d at 233. In sum, the First Circuit only considered Oettinger's unimpeached, uncontradicted testimony.

B. The First Circuit Did Not Resolve Conflicting Testimony.

Webber's argument that the First Circuit resolved conflicting testimony is disingenuous. In discussing whether Schaub or Moser's alleged animus could be attributed to Oettinger, the First Circuit recounted the difference between Webber's and International Paper's *characterization* (via counsel) of the evidence.

> Webber notes (i) that Oettinger consulted with Schaub and Moser three days prior to the termination, and (ii) that Moser decided to mull the issue over during the weekend. IP counters that the purported animus on the part of Schaub

> and Moser is irrelevant since Oettinger testified (i) that he was the only decisionmaker regarding Webber's termination, (ii) that he simply notified Schaub and Moser of his final decision, and (iii) that neither Schaub nor Moser either participated in or contributed to the decision. The truth is to be found somewhere between these two *characterizations*, however.

Webber, 417 F.3d at 236.

While "[r]esolving conflicting evidence is not the role of the appellate court" (*see* Webber Petition at 14), resolving counsel's conflicting characterizations and arguments is the role of the appellate court. Weighing evidence in a light most favorable to Webber, does not mean that the First Circuit was required to accept Webber's characterization of the evidence or record. Under *Reeves*, the Court "should review the record as a whole" giving all reasonable inferences to the nonmovant. The First Circuit weighed all reasonable inferences in Webber's favor but appropriately rejected his assertions and characterizations that the record did not support.

C. The First Circuit Did Not Omit Material Evidence.

Webber argues that the First Circuit omitted material evidence. Webber is mistaken. The First Circuit considered most of the "omitted" evidence and the evidence not mentioned was immaterial. Webber argues that the Court failed to adequately consider International Paper's failure to offer Webber the SQA position. Contrary to Webber's contention, the Court considered Webber's evidence that

International Paper "could have transferred him to the open position of supplier quality assurance (SQA) coordinator." *Webber*, 417 F.3d at 240. Ultimately, the Court sided with well-settled First Circuit (and Seventh and Eleventh Circuit) law—that is, "an employer undertaking a RIF is not required to offer an employee a transfer to another job position." *Id.* citing *Pages-Cahue v. Iberia Lineas Aerear de Espana*, 82 F.3d 533, 538-39 (1st Cir. 1996).

Similarly, Webber argues that the First Circuit omitted International Paper's alleged failure to provide a "more detailed explanation[] . . . of why an engineering degree was essential to Mr. Webber's retention." Webber Petition at 17. However, the First Circuit considered Webber's argument and rejected it. *Webber*, 417 F.3d at 238 ("Under the business judgment rule, the possession of a degree can be a reasonable criterion for retaining on employee over another." (citations omitted)).

Webber also argues that the First Circuit ignored International Paper's alleged long delay in implementing the many accommodations it gave Mr. Webber. However, as mentioned, the record he cites does not support his assertion. *See* Webber Petition at 17 ("The First Circuit stressed accommodation [sic] IP gave to Mr. Webber, A-3a, but ignored the long delay in implementing them. *A-96-100, A-198-199.*") (emphasis added). Indeed, nothing in the record supports this assertion.

The remaining "omitted evidence" of discrimination (i.e. Oettinger knew Webber injured his knee at work, IP did not want workplace injuries, and Dr. Read ordered Webber to go home so he did not further injure himself) is immaterial and does not, in a light most favorable to Webber, tend to prove discrimination.

II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *O'CONNOR*.

Webber attempts to create a conflict with *O'Connor* where none exists. As an initial matter, the First Circuit did not affirm the district court's decision by holding that Webber failed to establish a *prima facie* case. To the contrary, in determining whether Webber had advanced sufficient evidence from which a reasonable jury could conclude that his job was eliminated because of his disability, the Court looked at many factors, including the strength of Webber's *prima facie* case.

> While the failure or weakness of a *prima facie* showing will not alone constitute grounds for judgment for the employer, it significantly weighs in the balance when we assess whether the plaintiff adduced sufficient evidence overall from which a jury rationally might infer that the employer's articulated reason constitutes a pretext for discrimination, and that the real reason for the termination was discriminatory animus.

Webber v. International Paper, 417 F.3d at 235.

Moreover, even if the First Circuit had affirmed the district court's decision solely on the basis of Webber's failure to state a *prima facie* case, the Court's decision would not conflict with *O'Connor*. In *O'Connor* the sole question presented was "whether a plaintiff alleging that he was discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA) . . . must show that he was replaced by someone outside the age group protected by

the ADEA to make out a prima facie case. . . ." 517 U.S. at 309. Importantly, *O'Connor* was a "non-reduction-in-force case." 517 U.S. at 310 n.1. *Webber* was not.

The First Circuit—and every other Circuit in the country[2]—has recognized that there is a different standard for stating a *prima facie* case in the context of a reduction in force. *Udo v. Tomes*, 54 F.3d 9, 12 (1st Cir. 1995); *LeBlanc v. Great American Insurance Co.*, 6 F.3d 836, 842 (1st Cir. 1993). Since *Webber* was a reduction-in-force case, and *O'Connor* was not, there would be no conflict between these two cases even if the First Circuit's holding was based solely on Webber's failure to state a *prima facie* case.

2. *Monaco v. American General Assurance Co.*, 359 F.3d 296, 300-01 (3d Cir. 2004); *Dugan v. Albemarle Cnty School Bd.*, 293 F.3d 716, 720 (4th Cir. 2002); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1137 (10th Cir. 2000); *Skalka v. Fernald Envtl. Restoration Mgt. Corp.*, 178 F.3d 414, 420-21 (6th Cir. 1999); *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137, 1141 (7th Cir. 1998); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1316 (8th Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 252 (5th Cir. 1996); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1082 (11th Cir. 1992); *Duncan v. NYC Transit Authority*, 2002 U.S. App. LEXIS 17674 at *2-3 (2d Cir. 2002).

CONCLUSION

Webber has failed to demonstrate any reason (and certainly not a *compelling* one) why this Court should grant his Petition. He has failed to demonstrate a conflict with any decision of this Court or that the First Circuit "departed from the accepted and usual course of judicial proceedings. . . ." Rule 10 (a), Rules of the Supreme Court of the United States. Consequently, Webber's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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